IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 5257, Misc.

LOU BERTHA LABINE, NATURAL TUTRIX OF THE MINOR CHILD, RITA NELL VINCENT,
Appellant,

versus

SIMON VINCENT, ADMINISTRATOR OF THE SUCCESSION OF EZRA VINCENT,
Appellee.

APPEALED FROM THE SUPREME COURT OF LOUISIANA

BRIEF OF AMICI CURIAE ON BEHALF OF THE BURAS HEIRS AND THE HEIRS OF EARL O. STRAHAN, URGING AFFIRMANCE

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MOTION FOR PERMISSION TO FILE BRIEF AMICI CURIAE

William L. Strahan and Martha H. Strahan, the legitimate heirs of Earl O. Strahan, deceased, and the legitimate heirs of

Pierre Leon Buras, respectfully move for an order permitting them to file a brief as Amici Curiae for the following reasons:

1.

The consent of the appellant and the consent of appellee has been obtained, as shown by the attached correspondence.

2.

William L. Strahan and Martha H. Strahan, the legitimate heirs of Earl O. Strahan, who died in 1964, are involved in litigation entitled, "Lyle E. Strahan v. William L. Strahan and Martha H. Strahan," Docket No. 29052 in the United States Circuit Court of Appeals, Fifth Circuit, on appeal from the United States District Court for the Western District of Louisiana, and the legitimate heirs of Pierre Leon Buras are involved in litigation entitled, "United States of America v. Leon Buras, Jr., et al," Civil Action No. 4977 on the Docket of the United States District Court for the Eastern District of Louisiana.

3.

In both the *Strahan* case which has been briefed, argued and submitted to the Fifth Circuit Court of Appeals, and the *Buras* matter, the validity of Louisiana's succession laws as they affect illegitimates are at issue. In the *Buras* case the district court has held that it was unnecessary to decide the question of whether or not the Fourteenth Amendment requires invalidation of Louisiana's succession laws as they affect illegitimates since even if the said laws are unconstitutional, the holding would not be applied retroactively since the illegitimate ancestor died in 1885. In the present appeal, an

important issue of constitutional law is involved. Moreover, because of Louisiana's distinct civil law heritage, the Court's decision in this case requires the consideration of the interrelationship of the numerous Articles of the Louisiana Civil Code and general concepts of the civil law in addition to those articles involved directly in this appeal. A decision sustaining appellant's constitutional contention in the present appeal would have a profound impact on the substantive law of Louisiana in areas of local law not directly before the court on this appeal.

4.

Petitioners will not necessarily concentrate on peculiar facts of their own cases. In the brief tendered with this motion petitioners will discuss the fundamental purposes of the intestacy laws of Louisiana and the reasonableness of the illegitimacy classification contained therein in the hope that it will assist the Court in the consideration of the issues presented on this appeal.

WHEREFORE, it is respectfully prayed that this motion for leave to file a brief amici curiae be granted.

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November 24, 1970

Mr. Don Moss
Hebert, Moss and Graphia
Attorneys at Law
118 St. Louis Street
Baton Rouge, Louisiana 70801

Re: Labine vs. Vincent
No. 5257, O. T. 1970
U. S. Supreme Court

Dear Mr. Moss:

I have delayed answering your letter of November 2 until we had finished preparing our brief to be filed in the above matter. We are enclosing a copy for your information, and we are also enclosing a copy of the brief filed on behalf of the Appellant.

We have no objection if you wish to appear in this case as an amicus curiae. We have discussed this matter with Mr. Arthur G. Watson in Natchitoches, who has also expressed an interest in our case.

We are returning to you the brief filed on behalf of the amicus curiae in Strahan vs. Strahan in the 5th Circuit. Thank you for sending this copy to us.

I attempted to reach you by telephone today, but was informed that you were out of town, and I left word for you to call me when you returned to your office.

Yours very truly,

James A. Leithead

JAL/jk
Encl.
cc: Mr. Arthur G. Watson

LAW OFFICES OF
COX & COX
702 KIRBY STREET
LAKE CHARLES, LOUISIANA 70601
TELEPHONE 436-6611

ES J. COX

WILLIAM N. COX

December 1, 1970

Mr. A. Leon Hebert
118 St. Louis Street
Baton Rouge, Louisiana 70801

Dear Mr. Hebert:

Enclosed herewith please find my consent as requested.

It will not be necessary for Mrs. Labine to sign the consent form sent by you.

If I can be of any further help please do not hesitate to contact me.

Sincerely yours,

COX & COX

BY: _____
James J. Cox

JJC/bl

Enc.

December 1, 1970

Mr. A. Leon Hebert
118 St. Louis Street
Baton Rouge, Louisiana 70801

Dear Mr. Hebert:

This is in response to your letter of November 30, 1970, requesting my consent to the filing of a brief Amici Curiae in the case of "Lou Bertha Labine, Natural Tutrix of the Minor Child, Rita Nell Vincent, Appellant, v. Simon Vincent, Administrator of the Succession of Ezra Vincent, Appellee," No. 5257 in the Supreme Court of the United States. As attorney for the petitioner in that case I hereby give such consent.

Sincerely yours,

James J. Cox, Attorney
for Lou Bertha Labine

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 5257, Misc.

LOU BERTHA LABINE, NATURAL TUTRIX OF THE MINOR CHILD, RITA NELL VINCENT,
Appellant,

versus

SIMON VINCENT, ADMINISTRATOR OF THE SUCCESSION OF EZRA VINCENT,
Appellee.

APPEALED FROM THE SUPREME COURT OF LOUISIANA

BRIEF ON BEHALF OF THE AMICI CURIAE

THE INTEREST OF AMICI CURIAE

Amici Curiae are both engaged in litigation involving an attack on the Louisiana laws of intestacy insofar as they distinguish between the rights of legitimate and illegitimate descendants. The factual situations presented for determination in their own respective cases are distinctly different, however, and deserve brief mention.

With respect to the *Buras* case, Pierre Leon Buras died in 1908, after which time his legitimate heirs went into possession of his estate. A title dispute between the Buras heirs and the United States is the subject of litigation presently on appeal to the Fifth Circuit Court of Appeals. Shortly prior to the trial of the case, an intervention was filed on behalf of descendants of an illegitimate child of Pierre Leon Buras who had pre-deceased him in 1885. The property rights had been vested in the legitimate descendants of Pierre Leon Buras for 61 years before the illegitimate branch, relying upon *Levy v. Louisiana*[1] and *Glona v. American Guaranty Liability Ins. Co.*,[2] presented their claim.

In *Strahan*, the decedent died in 1964, and, similarly in conformity with Louisiana intestacy laws, the decedent's mother and brother were placed in possession of the decedent's estate. Four years after the death of the decedent, an individual claiming to be the decedent's illegitimate child made a claim to the decedent's estate. One other distinguishing factor in the *Strahan* case is the fact that the decendent died partially testate, which is indicative of his intent not to provide for claimant even if he did know of his existence.

THE QUESTIONS PRESENTED

The questions presented are whether the Louisiana Civil Code articles distinguishing between legitimates and illegitimates for the purpose of the laws of intestate succession are violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution, and, if so,

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1 391 U.S. 68, 88 S.Ct. 1509 (1968).
2 391 U.S. 73, 88 S.Ct. 1515 (1968).

should such a holding be applied retroactively to divest vested rights in property.

STATEMENT OF THE CASE

Ezra Vincent acknowledged Rita Nell Vincent to be his natural child by notarial act in 1962 in accordance with the provisions of Louisiana law. He died in 1968. Under Louisiana law, the decedent could have bequeathed his entire estate to his daughter; however, he died intestate, and his estate passed to his brothers and sisters, since Louisiana laws of intestacy declare that the collaterals inherit the estate of the male decedent to the exclusion of illegitimate offspring of the decedent who have not been legitimated.

The Trial Court and the Louisiana Court of Appeal for the Third Circuit found that the collateral heirs were entitled to the estate of the decedent and that the provisions of the Louisiana Civil Code relating to the respective rights of the parties did not violate the Constitutional guaranties of the Fourteenth Amendment. This appeal lies from the denial by the Supreme Court of Louisiana of an application for certiorari or writ of review.

ARGUMENT

I. THE LOUISIANA CIVIL CODE ARTICLES DISTINGUISHING BETWEEN LEGITIMATES AND ILLEGITIMATES FOR THE PURPOSE OF THE LAWS OF INTESTATE SUCCESSIONS ARE CONSTITUTIONAL.

Appellant, relying upon the decisions of this Court in *Levy*[3] and *Glona*,[4] challenges the validity of Louisiana law

[3] Supra, note 1.
[4] Supra, note 2.

that declares the collaterals of an intestate decedent prime the rights of a decedent's illegitimate child to the decedent's estate. *Levy* held that the denial to illegitimate children of the right to recover for the wrongful death of their mother, on whom they were dependent, constitutes invidious discrimination against them. *Glona*, conversely, permitted the parent to recover for the wrongful death of her illegitimate child. Appellant seeks to apply the rationale of these cases to the intestacy laws of Louisiana. However, even a cursory review of the majority and minority decisions in those cases reflects that the Court did not intend to strike down, as *per se* unconstitutional, the distinction between legitimacy and illegitimacy for the purposes of the laws of succession. Justice Douglas, speaking for the Court, stated that in terms of equal protection, there was no reason for a tort feasor to "go free" merely because a child is illegitimate.[5] Again, in *Glona*, Justice Douglas stated that the refusals to grant a woman relief for the wrongful death of her illegitimate child created a windfall to tort feasors.[6] Similarily, the dissenting opinion in the aforementioned cases referred to the decisions as "constitutional curiosities."[7]

The *Levy* controversy raged around Louisiana's wrongful death statute. This legislation is *sui generis* and completely unrelated to inheritance law.[8] The Court observed that in the absence of such a statute all children, whether legitimate or illegitimate, are equally denied recovery for wrongful death. Since the wrongful death act automatically takes into consideration factual differences that may exist between the condi-

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[5] Levy v. Louisiana, 391 U.S. at 71.
[6] Glona v. American Guaranty & Liability Ins. Co., 391 U.S. at 75.
[7] 391 U.S. at 73 (Harlan, J., dissenting opinion).
[8] Levy v. Louisiana, 216 So.2d 818, 253 La. 73 (1968); Guidry v. Crowther, 96 So.2d 71 (La. App. 1957); Covey v. Marquette Cas. Co., 84 So.2d 217 (La. App. 1955); Young v. McCullium, 74 So.2d 339 (La. App. 1954).

tions of legitimates and illegitimates by limiting recovery to the actual damage the child sustains, there was no rational basis terminating equality of treatment between legitimates and illegitimates with respect to the right to bring a wrongful death action when the rule of *damnum absque injuria* ended. Thus, for example, if it were true an illegitimate child has less affection for its parent and was less dependent on the parent, its loss and subsequent recovery would be more moderate. Each child is, in effect, treated as a separate class, thereby obviating the need for a legal distinction between legitimates and illegitimates.

However, this analogy cannot be extended to succession law. Unlike tort claimants, potential heirs simply cannot be treated on an individual basis. There is no legal proceeding capable of measuring the quality of potential heir's relationship with the decedent. Were such a proceeding feasible, there still would be no means for comparing conflicting claims. The State, therefore, must establish a system relating to the transmission of property that cannot, in every **individual** case, create rights of inheritance that are coextensive with the psychological and emotional bonds that existed between a particular decedent and a particular heir. Unadulterated biology would clearly be an unsuitable arbiter for a state to use in succession law. A biological test would favor siblings, the closest genetic relations, over children, and would place ascendants and descendants of the same degree on an equal footing. Spouses, barring incest, would be excluded completely.

The Louisiana Civil Code seeks to achieve stability and to facilitate the orderly transmission of property by creating a system of legal heirship, the heart of which is a rational and reasonable classification of potential heirs based on the real-

ities of family life, the furtherance of the legitimate interest and the encouragement and preservation of the family as a social institution, and the need for certainty and finality.

Chief Judge John R. Brown of the 5th Circuit Court of Appeals in the case of *Murphy v. Houma Well Service,*[9] in upholding the presumption of legitimacy found Louisiana law against an attack on the constitutionality of the presumption, commented that the underlying policies of Louisiana are certainly pertinent to the issue there under consideration. He stated:

> "In this light Louisiana undoubtedly has an interest in protecting the intimate family relationship from divisive and destructive attacks by those seeking to challenge the legitimacy of children born during wedlock. As one respected commentator in this field has stated:
>
> > " 'The propriety of the state's interest in the family therefore is beyond question, and state legislation fairly designed to encourage the stability of the family must go unchallenged.' *
>
> * "Krause, Equal Protection for the Illegitimate, 65 Mich. L.Rev. 477, 492 (1967)."

While at common law the illegitimate was a *filius nullis,* the son of nobody, a non-person who could inherit nothing,[10] the Civil law historically treated illegitimates more favorably allowing them among other rights, to inherit from the mother.[11] Modern statutes derived from codification of the

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[9] 413 F.2d 509 (1969).

[10] See Blackstone, *Commentaries* Bk. 1 Ch. XVI P. 173 (Chase ed. 1890).

[11] See Annotation to Stevenson's Heirs v. Sullivant, 5 Wheat (U.S. 207, 5 L.Ed. 70).

common law no longer consider the illegitimate as *filius nullis*, most giving him the same status as legitimate children with regard to inheritance from his **mother**, yet properly denying him the right to inherit from his father, except by will, unless the father has formally recognized or acknowledged him.[12]

Louisiana law provides that if an illegitimate child is legitimated, he will inherit from either parent as if legitimate, i. e., as if born during marriage. The child may be legitimated by the subsequent marriage of the father and mother, coupled with any informal acknowledgment either before or after the marriage.[13] The natural parents need not even marry to legitimate a child under the provisions of Louisiana Revised Statutes 9:381. Similarly, the natural child could be adopted by a natural parent, Louisiana Revised Statutes 9:101, et seq. Each of the aforementioned alternatives would result in the child's acquiring the status of a legitimate child with respect to the legitimating or adopting parent or parents. Thus, in the case at bar as well as in the *amici* cases, the decedent could have made the illegitimate a legal heir to share with all others in the event of his intestate death. Needless to say, by testament each of the decedents could have given an inheritance to the illegitimate.

With respect to illegitimates acknowledged but not legitimated, Louisiana law provides that they inherit from the mother if there are no legitimate descendants and then to the exclusion of all others.[14] Acknowledged illegitimates inherit from the father only in the absence of lawful descendants, ascendants, collaterals, and surviving wife.[15] Unacknowledged

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12 "Equal Protection for the Illegitimate," 65 Mich L.R. 477, 478 (1967).
13 La. Civ. Code Art. 199.
14 La. Civ. Code Arts. 918, 924.
15 La. Civ. Code Arts. 919, 924.

illegitimates do not enjoy the right of inheriting and are entitled only to alimony.[16]

By virtue of its civil law heritage, Louisiana has always resorted to an integrated code concept of law as distinguished from the well known method of the common law. Louisiana's Civil Code contains countless concepts of private law—all interrelated to form a cohesive body of law. The distinctions drawn by the Louisiana Civil Code reflect natural law concepts and social realities that have influenced human action for centuries. For example, the Code recognizes that natural mothers possess stronger ties with their children than fathers by providing in Article 918 that illegitimate children recognized by their natural mothers shall inherit their mother's succession to the exclusion of her legitimate parents or collaterals. On the other hand, the illegitimate child is not accorded such a high rank in the succession of his natural father. (The same principle supports Louisiana Revised Statutes 9:404 which allows a natural mother to surrender her child for adoption without approval of the natural father where he has not formally acknowledged or legitimated the child.) The theme appears again in Louisiana Civil Code Article 256 which establishes the natural mother as tutrix of her natural child not acknowledged by the father, or acknowledged by him alone without her concurrence.

The complementary nature of rights and duties existing between parents and children illustrates the rationality of the Louisiana Civil Code classification based on legitimacy. Article 26 states that birth subjects legitimate children to the power and authority of their parents. Article 238, on the other hand, provides that illegitimate children are not subject to paternal

[16] La. Civ. Code Art. 920.

authority even if they have been legally acknowledged. Thus, an illegitimate child is free from the restrictions and controls which might be exercised by his parents. The illegitimate child need not submit to parental discipline or obtain parental consent to enter into contracts, including the contract of marriage. The legitimate child cannot sue either parent during the continuation of their marriage under the provisions of Louisiana Revised Statutes 9:571. The illegitimate child suffers no such disability. While the illegitimate child has free use of his property Louisiana Civil Code Article 223 bestows a "right of enjoyment" on the estate of legitimate children during minority in favor of their parents. The legitimate father, unlike his natural counterpart, is the administrator of the estate of his minor child and may bring actions on his behalf by provision of Louisiana Code of Privil Procedure Article 683. It is entirely reasonable that the illegitimate child, freed from these various forms of parental control and burdens on his estate should, as a correlative, be placed in a different position for the purpose of the laws in inheritance.

The biological and anthropological realities of the family unit impose restraints and controls on legitimate children. The parents and other relatives acting as a family insure that parental power will be exercised in the child's best interest. By the same token, the obligations imposed by family life give rise to the rights enjoyed by parents over their children's property. These rights may be regarded in some degree as compensation. Thus, the legitimacy distinction woven into the codal fabric is not only consistent and pervasive, but it is grounded on compelling logic.

Short shrift cannot be given to the strong public policy favoring the family institutions. The entire Louisiana Civil

Code, from the law of successions to the law of contracts, presupposes that the fundamental unit of organized society is the family, and it is incomprehensible to believe that the law cannot make some attempt to advance a public policy favoring viable and stable family units and disfavoring promiscuity. Even if the laws of inheritance empirically could be shown to have little effect on the rate of illegitimacy, the inheritance laws, by protecting the family as an economic unit, surely support its continued existence as a social and biological one. Such an empirical demonstration has not here been made, however, and absent clear evidence to the contrary it is reasonable to assume that potential parents of illegitimates will in some measure be discouraged from producing illegitimates by any legal stigma attached to that status. **An otherwise constitutional statute is not subject to the Fourteenth Amendment's prohibitions because it might fail to bring about the desired result.**

II. ALTERNATIVELY, SHOULD THIS COURT DECIDE THAT DISTINCTIONS MADE BETWEEN LEGITIMATES AND ILLEGITIMATES ARE UNCONSTITUTIONAL FOR PURPOSES OF SUCCESSION, THAT DECISION SHOULD ONLY BE APPLIED PROSPECTIVELY.

The substantive law of Louisiana at the time of the death of Ezra Vincent gave to his daughter, Rita Nell, no interest in her natural father's successions since he was survived by collateral relations. Under the substantive law of Louisiana, the collateral heirs immediately succeed to, and are vested with, full ownership of all property rights belonging to the decedent.

An example of the recognition that inheritance rights be-

come vested upon the death of one's ancestor, and that these rights cannot be impaired or divested by a retroactive or retrospective legislation is the case of *Henry v. Jean.*[17] In 1944, Article 198 of the Civil Code was amended to provide for another manner of legitimation. The Louisiana Supreme Court, in *Henry v. Jean*, stated that the amendment to the statute created new substantive rights and could have no retrospective effect. The court further stated:

> "Of course, if the statute under consideration undertook to take away or impair vested rights acquired under the existing laws, created a new obligation or imposed a new duty or disability with respect to transactions or considerations already passed, it would have to be classified as retrospective to its operation. . . . But the legitimations resulting from the enactment of the statute have not accorded to persons legitimated any rights in the successions of persons who died before the passage of the Act, their right of inheritance being governed by legal status at the instant of death, at which time the right of inheritance vests. Articles 940, 942, 944, Civil Code."[18]

Subsequent to *Mapp v. Ohio*[19] this court declined, in *Linkletter v. Walker*[20] to grant retroactive application of its holdings so as to void convictions that had become final before *Mapp* was announced, and stated that the effect of a ruling of invalidity on prior final judgments when collaterally attacked is subject to no set principle of absolute retroactive invalidity, but depends upon a consideration of " 'particular relations . . . and particular conduct . . . of rights claimed to have become vested, or status, of prior determinations deemed to

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17 238 La. 314, 115 So.2d 363 (1959).
18 Id. at 367 (Emphasis supplied). Similarly, see 10 Am. Jur. 2d § 153, p. 955.
19 367 U.S. 643 (1961).
20 381 U.S. 618 (1965).

have finality'; and 'of public policy in the light of the nature both of the statute and of its previous application.' "[21] Speaking of the possible retroactivity of the *Mapp* decision, the *Linkletter* court made the following observation:

> "We believe that the existence of the Wolf Doctrine prior to Mapp is 'an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration.' *Chicot County Drainage Dist. v. Baxter State Bank*, supra, 308 U.S. at 374, 60 S. Ct. at 319. The thousands of cases that were finally decided on Wolf cannot be obliterated. The 'particular conduct, private and official,' must be considered. Here 'prior determinations deemed to have finality and acted upon accordingly' have 'become vested.' And finally, 'public policy in the light of the nature both of the (Wolf Doctrine) and of its previous application' must be given its proper weight. Ibid. In short, we must look to the purpose of the Mapp rule; the reliance placed upon the Wolf Doctrine; and the effect on the administration of justice of a retrospective application of Mapp."[22]

Similarly, comment by a prosecutor or a judge upon a defendant's failure to testify in a state criminal trial violated the federal privilege against compulsory self incrimination.[23] In 1966, the Supreme Court decided in *Tehan v. Shott*[24] that the *Griffin* ruling was not to be applied to cases which had become final before it was announced. In *Tehan*, the Supreme Court stated:

> "Rather, we take as our starting point the *Linkletter* conclusion that 'the accepted rule today is that in appropriate

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[21] Id. at 627, citing and quoting Chicot County Drainage Dist. v. Baxter State Bank, 308 U. S. 371, 374 (1940).
[22] Id. at 636.
[23] Griffin v. California, 380 U.S. 609 (1965).
[24] 382 U.S. 406 (1965).

cases the Court may in the interest of justice make the rule prospective,' that there is 'no impediment—constitutional or philosophical—to the use of the same rule in the constitutional area where the exigencies of the situation requires such an application,' in short that 'the constitution neither prohibits nor requires us to 'weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' 386 U.S. at 628-629, 85 S.Ct. at 1737-1738."[25]

Thus, in both cases the court emphasized as a reason for limiting retroactivity the stress which full application would impose upon the administration of justice, and weighed this stress against the dilution of the purposes of the new rules.

Similarly, in *Johnson v. New Jersey*[26] and *Desist v. United States*[27] the court refused to grant retroactive application to new constitutional pronouncements.

In short, very few of this Court's new constitutional rulings have been applied retroactively so as to overturn decisions that have been final or to alter rights (or disabilities) that have become vested. Under the rationale of these cases, great weight is given to the unsettling and disruptive effect that a retroactive application of the new constitutional principle would have. In this connection, it is important to note that these cases involved rights of personal liberty, rather than rights of property, the latter of which is before this Court. Since it is obvious that this Court has recognized the primacy of personal rights over property rights, the fact that it has held that most of its decisions concerning personal free-

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[25] Id. at 461.
[26] 384 U.S. 719 (1966).
[27] 394 U.S. 244.

doms are not to be retroactively applied is a persuasive reason for arguing that laws with respect to the devolution of property should not be held unconstitutional retroactively.

At the same time, the Supreme Court has made the determination of whether or not its decisions would be applied retroactively by considering whether vested rights would be divested and whether the retroactive application of its decision would cause problems in the administration of the courts. In the case before this Court, were it held that the rule enunciated in *Levy* invalidated the Louisiana laws of inheritance and also that this decision would be retroactively applied, vested rights of parties would be divested, and it is indeed clear that every single land title in this state would be suspect and parties could only rely upon the laws of prescription to be certain of their ownership. Such an unsettling and disruptive influence must be avoided, since there is no primacy of public interest which would demand retroactive application, as might be the case in certain areas involving fundamental rights of personal liberty. Indeed, considerations of public interest, specifically recognized by the Court as a valid consideration, require that the *Levy* rationale not be applied retroactively. It is certainly in the public interest to avoid completely disrupting an ordered system of property rights and titles upon which persons for generations have relied.

When this Court, in *United States v. Wade*[28] and *Gilbert v. California*[29] announced a new rule excluding identification testimony in criminal trials if based on exhibition of the accused in the absence of counsel or equivalent protection, the same issue had been presented in *Stovall v. Denno*[30] decided

[28] 388 U.S. 218 (1967).
[29] 388 U.S. 263 (1967).
[30] 388 U.S. 293 (1967).

the same day. The latter case involved a review arising out of a collateral attack of a conviction, which attack was begun after the possibilities of direct review had been exhausted. The Court held that except for *Wade* and *Gilbert*, the new rule would apply only to exhibitions occurring after the date the decision was announced, **and that it would not apply in *Stovall*, decided the same day.** The Court here spoke in terms that clearly reflect a preference for prospective application in all cases.

Mr. Justice Brennan stated:

> "We recognize that Wade and Gilbert are, therefore, the only victims of pre-trial confrontations in the absence of their counsel to have the benefit of the rules established in their cases. That they must be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies of decision-making rooting in the command of Article III of the constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon **the incentive of counsel to advance contentions requiring a change in the law**, militate against Wade and Gilbert the benefit of today's decision. Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making."[31]

Mr. Justice Brennan termed Wade and Gilbert "chance beneficiaries" and implied that were it not for the requirement

[31] Id. at 301 (Emphasis added).

that their constitutional adjudications not stand as mere dictum, even Wade and Gilbert would not receive the benefit of the decision and that the decision would be prospective only.

Judge Fairchild's article entitled **Limitation of New Judge-Made Law to Prospective Effect Only: "Prospective Overruling" or "Sunbursting"**[32] suggested that the decision to apply a constitutional holding only prospectively is reached after a consideration of six factors. Each of the six factors will be stated and then a comment will be made upon how the issue before the Court relates to the particular factor.

The first factor is how explicitly and how long ago was the "old" rule announced or recognized, and how deeply does the "new" rule modify the "old"? If this Court holds that a classification for the purposes of inheritance based upon legitimacy or illegitimacy is unconstitutional, it will have overturned a rule that traces its tradition across the entire period of the statehood of Louisiana, to the French Civil Code, and ultimately as far back as Roman law. Such a decision would drastically modify the "old" rule with respect to laws of intestate succession.

The second factor is whether the "old" rule is of a type upon which people rely in making deliberate choices of conduct or dealing. Here again, it is clear that people have relied upon the provisions of the Louisiana Civil Code in deciding whether or not to write a will, and the entire legal profession has relied upon the "old" rule in determining the validity and merchantability of title.

The next factor is. "Was the old decision really erroneous

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[32] 51 Marquette L.Rev. 225 (1968).

when made, or have conditions changed so that it has subsequently become unjust?" The "old" decision found its basis in the explicit provisions of the Louisiana Civil Code. Any injustice in the "old" rule arises solely out of an expanded concept of equal protection.

The next factor is whether the "new" rule has been adopted primarily because it tends to prevent injustice which could, but need not **always**, result under the "old" rule. Assuming that the prior rule was unjust, it is absolutely clear that the result need not have been reached under the "old" rule, because under the law of Louisiana, legitimation of illegitimate children, in most instances, could have been effected.

The next factor is, "What is the extent of disruption which would result from retroactive application?" Here the answer is obvious. Every land title in this state would be suspect, succession proceedings would be reopened, and parties could only rely upon prescription (adverse possession) in order to be certain that their titles were valid.

The last factor is, "Have recent decisions suggested the probability of the change in the rule?" One need only cite the dissent of Justice Harlan in the *Levy* case to the effect that the decision was reached, "by a process that can only be described as brute force." There was no real expectation that the decision would have been decided in the manner it was. If this Court rules that *Levy* compels a holding that **inheritance laws** of the State of Louisiana are unconstitutional insofar as there is a classification based upon legitimacy, then the expectancy of such a decision was then even less likely. Certainly the Fifth Circuit Court of Appeals did not anticipate the *Levy* and *Glona* decisions, since the District Court's decision,

that the statute in question in *Glona* was constitutional, was affirmed **Per Curiam** by the Fifth Circuit!

Therefore, each factor advanced by Judge Fairchild, as applied to this case, would call for a limitation of any holding that the inheritance laws of Louisiana are unconstitutional to prospective application only. There is simply no overriding consideration that would merit a holding that interests vested in persons as long as sixty years ago (the case of the Buras heirs) or four years ago (in the Strahan case) be diminished or divested.

CONCLUSION

In summary, the rationale of the *Levy* and *Glona* decisions is inapplicable to laws treating legitimates and illegitimates differently with respect to their inheritance rights. *Levy* and *Glona* dealt with a wrongful death statute which is not a part of the general inheritance laws of the state.

Furthermore, intestacy statutes are designed to foster and protect the family unit and to carry out the presumed will of the decedent had he written a will. When a decedent dies without having provided for an illegitimate child, there is rational basis in a law which assumes that the illegitimate child was not part of the family unit and that the alleged father had no desire to leave him property.

To allow illegitimate children the right to inherit as if they were legitimate would cause considerable confusion in the law and would disrupt the security of land titles. Moreover, it would upset the family unit by making possible spurious claims, thereby disrupting the public order. We therefore urge affirmance of the opinion of the Court below.

Should this Court feel compelled to invalidate a large section of the Louisiana Civil Code as well as cast a cloud over the inheritance statutes of most states, the spectre of endless litigation fostered by retroactive application should be considered and the decision should only be given prospective effect.

Respectfully submitted,

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